STATE INTERFERENCE WITH THE ENFORCEMENT OF TREATIES[1]

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A STATE may interpose legal objections to the enforcement of a treaty within its borders upon any one of three general grounds:

1. That the power exercised under the treaty is wholly denied by the Constitution to the federal government generally or to the treaty power particularly; or

2. That the power, though vested in the federal government, is to be exercised only by Congress, or by some branch of the government other than the treaty power; or

3. That the power is vested exclusively in the states.

In the brief time at my disposal this paper will deal only with the third of these objections, a consideration of the others and of their bearing upon the third being remitted to another time and place.

The position of those who take a narrow view of the federal treaty power in this respect may be fairly stated as follows: The Tenth Amendment to the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." This but expresses the well-known historical fact that the United States is a government of limited and delegated powers. It cannot reasonably be supposed that the states meant to give to the treaty power a wider authority to override their internal domestic legislation than they gave to all the other departments of the federal government together, and therefore the consent of a state is necessary to the validity of any treaty that purports to operate

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as law within its borders upon any subject-matter within the powers reserved by the states from exercise by the other departments of the federal government.

This view of the treaty power is advocated by two able writers who have recently discussed the subject acutely and thoroughly.[1] No doubt their opinions are not shared by the great majority of American publicists today, and much current discussion perhaps assumes that the contrary doctrines are conclusively settled. So far as actual decisions are concerned this is disputable, and some of their arguments have perhaps never been specifically answered. If we share in any far-reaching reorganization of the world after the present war, our treaty power must play a great part in it, and so a careful re-examination of its theoretical basis at this time is not a mere beating of the air. Let me then suggest some of the considerations that seem controlling in interpreting the treaty-making power of the United States in this respect.

The position that treaties cannot, without the consent of the states, operate as law upon subjects reserved to the states as against the power of Congress seems opposed to the letter of the Constitution. One of the prime objects of that instrument was to divide the subjects of legislation between the states and the nation. This was done by conferring upon Congress specified powers, the remainder naturally remaining with the states. But the treaty power is conferred upon the United States without any enumeration of the topics to which it extends. Why should the powers of Congress be carefully enumerated and the treaty power be simply conferred in general terms, if the same limitations in favor of the states are to apply to each?

Nor does the language of the Tenth Amendment affect the case. This merely provides that powers not delegated to the United States by the Constitution are reserved to the states or to the people. The general terms in which the treaty power is given to the United States seem to delegate, as against the

[1] Henry St. George Tucker, Limitations on the Treaty-Making Power; and William E. Mikell, in University of Pennsylvania Law Review, vol. 57, pp. 435, 528.

states, the power to act upon any subject-matter within the usages of treaty making, and so the Tenth Amendment by its own terms is inapplicable. There may of course be some exceptions to this general power, arising out of other parts of the Constitution, but not, I think, from the Tenth Amendment. This view of the matter is confirmed by history, by international usage, by the decisions of our courts, and by the reasonable necessities of the case.

Article IX of the Articles of Confederation gave to the United States the exclusive right of entering into treaties and alliances, except that no treaty of commerce was to be made whereby the respective states should be restrained from imposing such imposts and duties on foreigners as their own people were subject to, or from prohibiting the export or import of any kind of goods. Article II reserved to the states every power, jurisdiction, and right not expressly delegated to the United States. Under the Confederation, the power to tax foreigners without discrimination and the power to prohibit exports and imports were certainly reserved to the states. If the general grant of the treaty power to the United States was not thought to carry with it any control over these reserved powers of the states, why were these express reservations against the treaty power in favor of the states inserted in Article IX of the Articles of Confederation? Apparently it was thought that without them the treaty power could not only regulate state taxation affecting aliens, but might even require it to discriminate in favor of them, and this in the face of an express reservation of states' rights in Article II stronger than the corresponding one in the Tenth Amendment of the Constitution.

The treaties entered into under the Confederation covered most of the subjects usual in treaties, nearly all of which fell within the legislative power of the states and not of the United States. Among the privileges thus secured to aliens were those of residence and trade, exemption from discrimination in respect of taxation, commerce, and navigation, the right to dispose of goods and lands by will, and the right to inherit. In the British treaty of peace it was agreed that British credi-

tors should meet with no impediments to the recovery of prior debts. The Confederation had provided no national machinery for the enforcement of treaties, however, and many of the states disregarded unwelcome provisions, particularly of the British treaty. In 1787 the Congress of the Confederation addressed a letter to the states, reciting that the legislatures of the states could not of right pass any law to interpret or limit the operation of a treaty; that, by virtue of the Confederation, treaties were part of the law of the land, independent of the will and power of such legislatures, and binding on them. The states were asked to repeal their laws inconsistent with the treaty of peace, as well to prevent their continuing to be regarded as violations of that treaty as to avoid the disagreeable necessity of discussing questions touching their validity. Most of the states did repeal such laws, and in several of them the courts held that the treaty annulled inconsistent laws without a repeal. In 1792 Jefferson himself, no friend of the treaty power, wrote to the British minister that these repeals were unnecessary, because, by the instrument of the Confederation, treaties were superior to the laws of the states, and that this was the general sense at least of those who were lawyers. Under the Confederation, therefore, treaties were the law of the land even in the field of the reserved powers of the states, though their rightful supremacy over state law was partly masked by the fact that the Confederation had no organs of its own to enforce them, and in some recalcitrant states they therefore went unenforced.

In the Philadelphia convention it was apparently assumed by everyone that the treaty power might freely deal with all the usual subjects of international negotiation. A few members desired to require the assent of the House of Representatives on at least the more important subjects, such as the possible dismemberment of the country, but no proposal like this secured even approximately a majority of the states. No effort whatever was made to protect the reserved rights of the states from the treaty power. In several of the state conventions that ratified the Constitution it was urged against the treaty power in the instrument that it authorized action that normally

fell within the province of Congress and of the state legislatures, without their consent. Some effort was made by the advocates of the Constitution to show that there were implied prohibitions against the surrender by the treaty power of vital functions of the national government, but no one suggested any such obstacle to possible encroachments upon the reserved powers of the states. In the opinion of Madison, when the Constitution was under discussion prior to its adoption: "The articles relating to treaties, to paper money, and to contracts created more enemies than all the errors in the system, positive and negative, put together." If the treaty power had been believed by its supporters not to affect the reserved powers of the states, this concession would surely have been made in argument in states like New York, Virginia, and Massachusetts, where the fight to secure a majority for the Constitution hung in the balance and was finally won by a narrow margin. In at least two of the state conventions amendments to the Constitution were proposed forbidding the treaty power to alter any provision of a state's constitution against the will of the state. That such amendments could be proposed shows clearly that those who adopted the Constitution were under no illusion that the treaty power was restricted in this regard, and it is also significant that no farther action was taken upon the proposed amendments. The commonest answer to those who objected to the treaty power in the Constitution was that it was practically identical in scope with that of the Confederation, but would have a means of enforcement in the federal courts that was lacking under the older government. The history of the framing and adoption of this clause in the Constitution lends no support to those who would restrict its scope as against the states.

From the early treaties with France in the eighteenth century down to the present time treaties have secured to aliens certain privileges in the states, that, but for such treaties, would be subject to state control. The commonest of these have been rights of freedom from discrimination in respect of travel, residence, trade and taxation, and the right to transmit or to succeed to property at the death of the owner. Since the adoption of the Fourteenth Amendment in 1868 many state laws dis-

criminating against aliens fall under its prohibitions as well as those of any applicable treaty, but even here it is to be noted that not every discrimination violates the due process clause, and that the equality clause of the Fourteenth Amendment applies only to persons within the jurisdiction, while treaties frequently protect the rights of non-resident aliens. Several state decisions before the Fourteenth Amendment upheld these treaty stipulations against the law of the state, and none have ever held a treaty invalid in any particular when admitted to be inconsistent with a state law.

The decisions under this head which have attracted the most attention have been those in the federal Supreme Court upholding the treaty rights of aliens to take land by inheritance or devise against the common or statute law of the state. These are the cleanest-cut illustrations of the supremacy of treaties over local state laws, because even today such laws are unaffected by the Fourteenth Amendment. By the common law an alien could not inherit land, or take an indefeasible estate by deed or will. The Fourteenth Amendment has not altered this. If a treaty can give to an alien, and especially to a non-resident alien, a privilege in this regard that will override the state law, plainly the breach in the general principle contended for by our strict constructionist friends is irreparable. Now a series of federal cases from about 1813 down to the present time has apparently sanctioned just this doctrine, and consequently great efforts have been made to show that these cases are less conclusive than they seem. Two lines of attack have been taken. Dean Mikell suggests that the earlier cases accepted without consideration some still earlier dicta, and that the later ones have assumed without argument that the matter was settled. It is true that most of the opinions in these cases contain no amplification of their grounds of decision, and that only the well-known opinion of Mr. Justice Field in Geofroy *v.* Riggs, 135 U. S. 258, attempts any general analysis of the treaty power. But it sometimes happens that the simplest points are the most devoid of direct authority, and it is not an argument against a position that for several generations counsel have thought it too well settled to contest it.

Mr. Tucker's argument is more ingenious. It is this: The state laws forbid aliens to inherit land. If a man ceases to be an alien he can inherit, and he does so not by overriding the state law but by coming within its terms. The federal treaties which purport to confer powers of inheritance upon aliens really operate by changing their status of alienage for the purposes only of inheritance, just as they would undoubtedly operate if they effected a complete naturalization of the alien. Therefore there is no real conflict between the state law and the treaty.

This mode of reasoning seems to me an impressive illustration of the power of words to becloud ideas. When a state law forbids an alien to inherit land, what does it mean by alien? Does it mean a person who is not yet in fact an American citizen, or does it mean merely a person upon whom our federal government has not yet purported to confer a capacity to inherit? The policy back of such a law is evidently that the ownership of the soil of a country is so important that it should be confined to its own citizens. Within the policy and meaning of such a law—a policy and meaning which, by hypothesis, the treaty power cannot coerce—does a Frenchman, who has never left France and has no intention of doing so, cease to be an alien merely because the federal government has agreed that he may inherit land here? This would be a question of construction of the state law, and, if a state court should decide, as it seems to me it rationally must, that such a Frenchman as I have described is still an alien, within the meaning of the state law, there would be no ground upon which the federal courts could reverse the decision. Plainly the federal decisions upholding alien treaty rights to inherit land do not go upon the ground that the treaty is merely a circumstance that affects the result only if the state law is given a certain rather violent construction. They assume that the treaty has a legally controlling force of its own which annuls the state law, and which no construction of the latter could avoid. This is explicitly stated in Geofroy *v.* Riggs, above, and seems the only rational ground of decision.

The practical arguments in favor of the supremacy of the treaty power over the reserved rights of the states are even stronger than the historical and judicial ones. The Constitution expressly forbids the states to make treaties upon any subject. If the federal government cannot do so upon any of the subjects reserved to state legislation as against Congress, then no power exists in the country to make adjustments with foreign nations upon a considerable range of matters ordinarily the subject of international negotiation. Dean Mikell suggests that, while the states may not make treaties with foreign nations, they may with the consent of Congress enter into agreements and compacts (as permitted by Art. I, sec. 10, clause 3), and that this mode of procedure would both meet the need for international arrangements upon such topics and the desirability of preserving state home rule in regard to them.

In the first place this assumes that the words " agreements " and " treaties " in the Constitution largely overlap in meaning, so that the states might do by virtue of agreements with foreign nations much that the United States and other nations do by treaty, and yet, by changing the form or name of the transaction, might avoid the prohibition against their making treaties. As an original proposition this seems unlikely. It is probable that " agreement " refers to trifling and temporary arrangements between states and foreign powers, without substantial political or economic effects, not requiring diplomatic negotiations, and not likely either in results or administration to create friction. Any arrangement concluded by a single state which might either create international controversy or foster special political, social, or economic ties or influences would be open to the objections that caused the prohibition of treaties. Of this character seem to be many of the usual treaty stipulations regarding the reciprocal rights of aliens in respect of trade, property holding, etc. If the prohibition against state treaty making is seriously meant, it could not be evaded by calling important arrangements of this sort " agreements."

In the second place, even if the Constitution were held not to prohibit such agreements, Congress would probably rarely think it wise to assent to them, on account of a well-grounded

fear of encouraging sectional interests in foreign affairs and of opening undesirable channels of intercourse and influence between the states and foreign nations. It is far safer and more impressive for us always to act as a unit in our foreign relations.

And, in the third place, we can drive very much better bargains with outsiders if we are able from a central authority to grant privileges that are country-wide, instead of compelling those who deal with us to make forty or fifty separate agreements with as many different states, even with the ready assent of Congress. Think of the new field that would be opened for the exertion of unscrupulous influences, if foreign nations were permitted to seek domestic favors from our state governments instead of from the United States!

From every point of view the argument that the federal treaty power cannot act within the reserved powers of the states utterly fails. It is a much weaker one than the one against such action within the field of congressional power, because, in the latter case, a single organ of government, Congress, is able in any event to act for the whole country, and probably it does not often happen that the assent of two-thirds of the Senate can be secured to a treaty that would not also command the approval of a majority of the House if embodied in an act of Congress; while the proposal to require separate agreements between each of our forty-eight states and foreign countries could scarcely be matched for sheer political ineptitude.

Just as in the case of treaties operating within the field of congressional power, however, there may be an implied prohibition or two upon the treaty power within the field of state legislation. One of them has been judicially suggested—the cession of the territory of a state. Considering the permanent political effect of such an act upon a constituent member of the Union, for the preservation of which the Constitution stands pledged equally with the preservation of the United States itself, it may well be that the treaty power alone cannot cede part of a state without its consent, at least unless coerced by superior force. Treaties made under such compulsion are, except in form, no more the exertion of the ordinary constitutional powers of a state than the yielding of a watch under

the pistol of a highwayman is an exercise of the victim's power freely to dispose of his property; and all arguments based upon the assumed effect of such treaties are fallacious.

And, finally, I may say that the fear of the treaty power, which has so obsessed a few otherwise well-balanced and capable publicists in every generation, seems to me quite groundless. The fact that two-thirds of the Senate as well as the President must assent amply protects the country from the danger of the bias or the poor judgment of a small group of men; the Senate is now chosen by popular vote, if that be thought an additional safeguard; and Congress can at any time abrogate a treaty. The opportunities for abuse are small. National prejudices offer a sturdy resistance to attempts unduly to favor foreigners, and, the scope of treaties being limited to such subjects as actually concern foreigners, there is not a wide field for the internal operation of the power at any time. The apprehensions sometimes expressed that the president and the Senate, by a colorable treaty with an Indian chief or a Central American republic, might gain control over most of the domestic concerns of the states are wholly fanciful. Such treaties would be constitutionally operative only as to foreign interests actually involved, and, even if this were otherwise, when we reach the point where the president and two-thirds of the Senate can deliberately unite, against the will of the country, in so discreditable a subterfuge, the time will have come when something stronger than constitutional prohibitions will be needed to save us. How little we have to fear from the vagaries or mistakes of the treaty power appears when we contrast its work with that of our legislatures, state and national, upon which its encroachments are feared. Very few treaties have ever received popular disapproval, and, in scarcely an instance, has the verdict of history confirmed such condemnation. If the other departments of our governments had records as uniformly excellent as has the treaty power, we should have achieved a more than Prussian efficiency. It may be confidently asserted that, whatever dangers threaten American government now or in the future, the menace of an improvident exercise of the treaty power is not one of them.